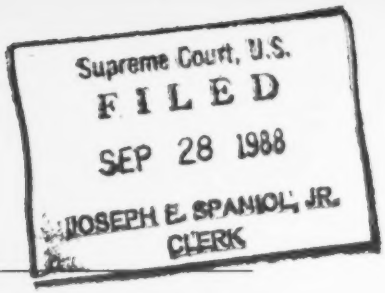

NO. 88-337

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, an agency of Pierce County, a municipal corporation of the State of Washington, HONORABLE RUDOLF TOLLEFSON, and ELAINE McNALLY,

Petitioners,

vs.

JEAN ELLIOTT, BRENDA POOLE, DIANE G. WARNER, LARRY PIERCE and JULIA FORSBERG,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN LADENBERG
PIERCE COUNTY
PROSECUTING ATTORNEY

William R. Bishin
LAW OFFICES OF
WM. R. BISHIN, P.S.
Special Pros. Atty.
1201 - 3rd Ave. #2780
Seattle, WA 98101
(206) 682-1584
Counsel of Record

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Commentary

9 Moore, Federal Courts, para. 204.14, pp. 4-119-120 (2d ed. 1987) 2

In brief reply to the Opposition to Petition for Writ of Certiorari Petitioner submits the following:

A. This Court Has Not Decided The Issue Raised by This Petition -- The Denial of Certiorari in Harcon Was Not a Decision on the Merits.

A denial of certiorari is not an adjudication on the merits. The fact that this Court refused to hear the Harcon appeal does not change the fact that this Court has never resolved the issue raised by the instant petition on the merits and upon a record which raises that issue.

B. The Concern of Courts That Appellants Be Given Notice of the Need to File a New Appeal is Not Confined to Pro Se Litigants.

The cases and commentary cited by petitioner show that courts and commentators are concerned about the trap created by FRAP 4(a)(1) and (4) for all litigants, not just pro se litigants.

Archer v. Lynaugh, 821 F.2d 1094, 1097 (5th Cir. 1987) ("such a notice would be inappropriate even in cases in which the motion is filed by counsel"); Nu Cheese v. Federal Deposit Insurance Co., 825 F.2d 1270 (8th Cir. 1987).

Moore's comment applies to all litigants. He mentions the pro se litigant merely as the one who is likely to test the Court's willingness to adhere to absolute requirements. 9 Moore, Federal Courts, para. 204.14, pp. 4-119-120 (2d ed. 1987).

The fact that the Ninth Circuit retained jurisdiction in this very case, rather than dismissing it, as Moore says should occur, and the fact that the trial Court's order expressly treats the appeal as valid and pending shows that the rule as structured, and if interpreted to apply to appeals filed before a 4(a)(4) post-trial motion, can and does lead to

error by court and court personnel as well as by counsel, experienced or not.

C. The Fact That Petitioner Had Both Trial and Appellate Counsel Below Has No Bearing on Whether This Court Should Hear Petitioner's Claims That the Rule Should Not Be Construed to Require a New Appeal Where the Post-Trial Motion Was Filed After the Notice of Appeal.

Petitioners have not stated all of the facts leading to its failure to file a new appeal from the judgment because many of them are not relevant to the issue on which they seek certiorari. Some of the facts now must be mentioned because Respondents refer to the fact that late in the lower court proceedings Petitioner engaged special counsel to handle the appeal.

The County did retain an appellate attorney, but he entered the proceeding long after the original appeal and the motion for equitable relief were filed. He was not involved in the prebriefing

conference and his first substantial contact with the equitable relief issue was when he reviewed and discussed the equitable relief Order with the County's trial counsel.

Trial counsel did not inform him of prior events and the earlier concern that the appeal might not be valid because the Order's reference to "this matter currently on appeal before the United States Court of Appeals" meant to him that a new appeal need not be filed. Obviously, if the appeal was invalidated by the motion for equitable relief, the "matter" could not have been "on appeal before" the Court of Appeals, since there would be no jurisdiction in that Court.

If FRAP 4 were written differently and did not, if literally construed, create a trap, trial counsel might not have given such weight to the trial court's reference.

Appellate counsel was handicapped because all he knew was that the Court of Appeals was exercising jurisdiction of the appeal -- he had seen its orders requiring Petitioner County to perfect the record -- and that the trial court's order referred to the appeal as pending.

If there had been a problem with the appeal none of these things should have happened and he should have expected to hear something about it from trial counsel. Appellate counsel was misled, but he almost certainly would not have been if the rule had been written differently and had not led to confusion in both the trial and appellate courts.

Conclusion

Respondents' Opposition does not state adequate grounds to deny the Petition for Writ of Certiorari and the

Writ should be granted.

JOHN LADENBURG
PIERCE COUNTY
PROSECUTING ATTORNEY

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